

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 4939 OF 2018

Mrs.Dilnashin Shaikh w/o. Amir Hamza Shaikh ... Petitioner

Vs.

State of Maharashtra ... Respondent

Mr.Karansingh Rajput for the Petitioner.
Mr. A.R.Patil, APP for the Respondent – State.

**CORAM: MRS.MRIDULA BHATKAR, J.
DATED: NOVEMBER 27, 2018**

P.C.:

1. Rule. Rule made returnable forthwith. By consent of the parties, the Petition is heard finally and disposed of at the stage of admission, as short issue is involved.
2. This Petition is directed against the order dated 23rd October, 2018 passed by the learned Metropolitan Magistrate, 69th Court, Mazgaon, Mumbai.
3. The petitioner, who is the complainant, had lodged F.I.R. with the police station. Pursuant to which, the offences were registered under Sections 498A, 406 read with 34 of the Indian Penal Code, 1860 against the husband and in-laws. The petitioner moved an application,

marked at exhibit 21, under Section 302 of the Code of Criminal Procedure, 1973 ("the Cr.P.C.") seeking permission to conduct the prosecution through a counsel appointed by her. After obtaining say of the prosecutor and hearing both the parties, the learned Magistrate has passed the following order :

"Perused the application and say filed and provisions of Cr.P.C. Allowed to assist the prosecution only as per provisions of law".

4. The order passed by the learned Magistrate is undoubtedly vague and not correct in view of the scope of Section 302 of the Cr.P.C.

5. The learned counsel for the petitioner has submitted that under Section 301 of the Cr.P.C., in the sessions trial, the Public Prosecutor or Assistant Public Prosecutor appears and necessarily conducts the trial unless there is an appointment of Special Public Prosecutor. He has further submitted that this is not the position under Section 302 of the Cr.P.C. Under Section 302 of the Cr.P.C., the prosecution can be conducted with the permission of the Magistrate. In support of his submissions, he relied on the judgment of the Supreme Court in the case of ***Dhariwal Industries Limited Versus Kishore Wadhwani and Others***¹.

¹ (2016) 10 SCC 378

6. The learned APP for the respondent has supported the submissions made by the prosecutor in the Metropolitan Magistrate Court and also supported the order passed by the learned Magistrate. He has submitted that a counsel appointed by the petitioner or complainant can assist the prosecutor and no prosecution can be conducted independently.

7. Section 302 of the Cr.P.C. reads as under :

"Permission to conduct prosecution.- (1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader".

8. On reading of Section 302 of the Cr.P.C., it is clear that the Magistrate can give permission to conduct prosecution to any person if the application is made by a party. I do not find any other rider in the said section except seeking permission of the Magistrate.

9. In the case of ***Dhariwal Industries Limited*** (*supra*), the Supreme Court has discussed distinction between Sections 301 and 302 of the Cr.PC. In the said case, the Supreme Court has incorporated the ratio laid down in the case of ***Shiv Kumar v. Hukam Chand & Anr.***², which is as under :

“It must be noted that the latter provision is intended only for magistrate courts. It enables the magistrate to permit any person to conduct the prosecution. The only rider is that magistrate cannot give such permission to a police officer below the rank of Inspector. Such person need not necessarily be a Public Prosecutor”.

On the same line, the Supreme Court in the case of ***Dhariwal Industries Limited*** (*supra*) has held as under:

“17. We have already explained the distinction between Sections 301 and 302 CrPC. The role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. As far as Section 302 CrPC is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently”.

10. In the impugned order, while rejecting the application, the learned Magistrate has not given any reason. A person who wants to conduct the prosecution if not a police officer in the investigation, I do not find any reason to reject the permission.

² (1999) 7 SCC 467

11. Under such circumstances, the order dated 23rd October, 2018 passed by the learned Metropolitan Magistrate, 69th Court, Mazgaon, Mumbai is hereby set aside. The application to conduct the prosecution by a private person/ party or by any other counsel engaged by the petitioner is hereby allowed.

12. Writ Petition is allowed. Rule made absolute accordingly.

(MRIDULA BHATKAR, J.)